

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 434

Applicant

- and -

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE RECEIVER
(Lien Claims Resolution Order)
Returnable August 9, 2024**

August 6, 2024

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PART I – INTRODUCTION

1. This factum is filed by Alvarez & Marsal Canada Inc., in its capacity as court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc., and Mizrahi Commercial (The One) GP Inc. (collectively, the “**Debtors**”), including a mixed-use development project located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario, marketed as “The One” (the “**Project**”), in support of the Receiver’s motion for an order (the “**Lien Claims Resolution Order**”) establishing a procedure for resolving Lien Claims asserted in Lien Notices delivered pursuant to the Lien Regularization Order of this Court dated March 7, 2024 (the “**Lien Regularization Order**”).¹

2. As of the date hereof, there are three outstanding Lien Notices that have been delivered (or deemed to have been delivered) pursuant to the Lien Regularization Order, certain of which may require a claims resolution process. In addition to the outstanding Lien Notices, the Receiver is aware of certain other unresolved trade and consultant claims that may result in the delivery of further Lien Notices, and there is the possibility of additional Lien Notices being delivered on an ongoing basis as construction of the Project continues.

3. In light of the unresolved Lien Notices delivered to date and the possibility of further Lien Notices being delivered in the future, the Receiver has determined that it is appropriate at this time

¹ Capitalized terms used herein and not otherwise defined have the meaning given to them in the Order (Appointing Receiver) of this Court dated October 18, 2023 (the “**Receivership Order**”), the Lien Regularization Order, the Lien Claims Resolution Order or the Fourth Report of the Receiver dated July 29, 2024 (the “**Fourth Report**”).

to seek approval of the proposed Lien Claims Resolution Order to provide a mechanism to fairly and efficiently resolve Lien Notices delivered pursuant to the Lien Regularization Order.

4. For the reasons specified herein and in the Fourth Report, the Receiver respectfully requests that this Court grant the proposed Lien Claims Resolution Order.

PART II – FACTS

A. Background

5. The Debtors are entities established for the purpose of developing the Project. On October 18, 2023, the Applicant sought the appointment of the Receiver pursuant to the Receivership Order for the principal purposes of bringing stability and appropriate oversight to the Project to ensure the continuing construction of same, and preserving and protecting the Property to maximize recoveries from the Project for the benefit of all stakeholders.²

6. Pursuant to the Receivership Order, the Receiver, as borrower, IGIS Asset Management Co., Ltd., as asset manager, and KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Fund No. 530, as lender, entered into a \$315 million Receivership Funding Credit Agreement to finance the ongoing construction of the Project and to fund the costs of these proceedings.³

7. As further detailed in the First Report, in late February 2024, the Receiver determined that it was in the best interests of the Project and its stakeholders to disclaim the GC Agreement and the Construction Management Agreement with Mizrahi Inc. (“MI”), in its capacity as the former

² [First Report of the Receiver dated February 26, 2024](#) at para 1.2 [First Report].

³ [First Report](#) at para 8.1.

developer and general contractor of the Project (in such capacity, the “**Former Developer**”), and to engage SKYGRiD Construction Inc. as the new construction manager of the Project (in such capacity, the “**Construction Manager**”), effective March 13, 2024.⁴

8. On March 7, 2024, this Court granted the Construction Continuance and Ancillary Relief Order and the Lien Regularization Order, which were sought to ensure the ongoing funding and uninterrupted construction of the Project during the transition of construction management from the Former Developer to the Construction Manager and to deal with any potential Lien Claims in a fair and efficient manner.⁵

B. Lien Notices under the Lien Regularization Order

(i) Lien Regularization Order

9. The Lien Regularization Order has established a Court-supervised streamlined process, administered by the Receiver, to replace the various technical requirements under the Provincial Lien Legislation for claiming, preserving and perfecting a Lien Claim. The Lien Regularization Order provides, among other things, that any person wishing to assert a Lien Claim against the Project shall do so by delivering a Lien Notice to the Receiver in accordance with the provisions of the Lien Regularization Order, following which such Lien Claimant shall be deemed to have preserved and perfected its Lien Claim.⁶

10. Paragraph 23 of the Lien Regularization Order provides that the Receiver shall, at a time deemed by the Receiver to be appropriate, bring a motion seeking approval of a process for

⁴ [First Report](#) at para 5.1.

⁵ Fourth Report at para 1.3; Motion Record, Tab 2, p 13 [[E967:E13](#)].

⁶ Fourth Report at para 2.2; Motion Record, Tab 2, p 14 [[E968:E14](#)].

reviewing, determining or challenging: (a) the validity or timeliness of any Lien Notice; (b) the validity or quantum of the amounts set out in any Lien Notice; (c) the entitlement of any Asserting Lien Claimant to a Lien Charge established under the Lien Regularization Order; and (d) the attachment, quantum or priority of any Lien Charge established under the Lien Regularization Order.⁷

(ii) *Existing Lien Notices*

11. As of the date hereof, there are three outstanding Lien Notices that have been delivered (or deemed to have been delivered) pursuant to the Lien Regularization Order, each as further detailed in the Fourth Report:

- (a) a Lien Notice deemed to have been delivered by Cult Iron Works Limited (“**Cult Iron**”) in respect of its Lien Claim in the amount of \$444,669.05 relating to amounts Cult Iron, as a former subcontractor previously engaged on the Project, alleges are owing to it in respect of holdback amounts and a claim relating to the prolongation of Cult Iron’s services as a result of delays in the Project’s construction schedule⁸;
- (b) a Lien Notice delivered by MI on April 26, 2024, in respect of a Lien Claim in the amount of \$11,041,387.76 relating to amounts MI alleges are owing to it for the work it performed on the Project in the post-receivership period in its capacity as Former Developer; and

⁷ Fourth Report at para 2.3; Motion Record, Tab 2, pp 14–15 [E968;E14 and E969;E15].

⁸ The Receiver and Cult Iron have resolved a portion of the Cult Lien (relating to holdback amounts) such that only Cult Iron’s prolongation claim in the amount of \$183,852.06 remains at issue.

- (c) a Lien Notice delivered by Gamma Windows and Walls International Inc. (“Gamma”)⁹ in respect of a Lien Claim in the amount of \$1,839,681.92 relating to amounts Gamma, a subcontractor engaged on the Project specializing in cladding and curtain wall supply and installation, alleges are owing to it in respect of certain unpaid invoices, holdback amounts, and certain amounts claimed by Gamma pursuant to a settlement agreement entered into between Gamma and MI on June 8, 2023.¹⁰

12. While MI’s Lien Notice is expected to be addressed in the context of the motion brought by MI in February 2024 seeking to compel payment by the Receiver of certain amounts (including amounts subject to MI’s Lien Notice), the Receiver disputes, either in whole or in part, the amounts alleged to be owing to Gamma and Cult Iron pursuant to their respective Lien Notices.¹¹ Accordingly, in the absence of the parties being able to achieve a consensual resolution, the Lien Notices of Gamma and Cult Iron will need to be addressed through a claims resolution process.

(iii) Additional Potential Trade and Consultant Claims

13. In addition to the above-noted outstanding Lien Notices, the Receiver is aware of certain other unresolved trade and consultant claims that may result in the delivery of further Lien Notices pursuant to the Lien Regularization Order. The Receiver and its advisors continue to engage with

⁹ Gamma has also served a motion seeking to compel the Receiver to make payment of certain amounts that are the subject of Gamma’s Lien Claim and to have the balance thereof referred to an Associate Judge for resolution. The Receiver disagrees with Gamma’s proposed process. In the Receiver’s view, if Gamma’s Lien Claim cannot be consensually resolved, it should be resolved in accordance with the process contemplated by the proposed Lien Claims Resolution Order. Justice Osborne held that these matters will be addressed at the return of the within motion.

¹⁰ Fourth Report at paras 4.3–4.5; Motion Record, Tab 2, pp 17–18 [E971;E17 and E972;E18].

¹¹ Fourth Report at para 4.7; Motion Record, Tab 2, p 19 [E973;E19].

the relevant parties in an attempt to consensually resolve these claims; however, there is the possibility that additional Lien Notices could be filed that could require resolution.¹²

14. Further, although construction of the Project has proceeded smoothly in the post-receivership period with limited payment-related disputes, as with any construction project, there is the possibility of disputes arising as ongoing construction of the Project proceeds, which could result in the delivery of further Lien Notices that require resolution.¹³

C. The Proposed Lien Claims Resolution Order

(i) Resolution of Lien Claims

15. The Lien Claims Resolution Order provides that the Receiver will review all Lien Notices delivered pursuant to the Lien Regularization Order and at any time in its sole discretion may: (a) demand particulars from a Lien Claimant in connection with any Lien Claim; (b) attempt to consensually resolve and settle a Lien Claim asserted in a Lien Notice with the relevant Lien Claimant; (c) by notice in writing to the relevant Lien Claimant, accept (in whole or in part) a Lien Claim asserted in a Lien Notice; and (d) by notice in writing to the relevant Lien Claimant, dispute (in whole or in part) a Lien Claim asserted in a Lien Notice and refer such Lien Claim to a Claims Officer or the Court for determination.¹⁴

¹² Fourth Report at para 4.8; Motion Record, Tab 2, p 19 [E973;E19].

¹³ Fourth Report at para 4.9; Motion Record, Tab 2, p 19 [E973;E19].

¹⁴ Fourth Report at para 5.2; Motion Record, Tab 2, p 20 [E974;E20].

16. Where a Disputed Lien Claim has been referred to a Claims Officer by the Receiver, the applicable Claims Officer shall, among other things:

- (a) determine the amount, validity, priority, timeliness and any other dispute in respect of such Disputed Lien Claim and shall provide written reasons;
- (b) establish a process for the fair and expeditious resolution of any Disputed Lien Claim, having regard to the quantum of the Disputed Lien Claim, the complexity of the issues and any other matter the Claims Officer considers relevant;
- (c) determine all substantive and procedural matters which may arise in respect of their determination of the Disputed Lien Claim;
- (d) have the discretion to mediate any dispute that is referred to such Claims Officer at its election and with the consent of the parties; and
- (e) have the discretion to make a cost award against or in favour of the Receiver or the Lien Claimant relating to the determination of a Disputed Lien Claim.¹⁵

17. The Receiver, the Lien Claimant, or any other stakeholder participant in a proceeding before the Claims Officer, may, within ten (10) days of such party receiving notice of the Claims Officer's determination of the Disputed Lien Claim, appeal such determination to the Court by serving and filing a notice of motion.¹⁶

¹⁵ Fourth Report at para 5.3; Motion Record, Tab 2, pp 20–21 [[E974;E20](#) and [E975;E21](#)].

¹⁶ Fourth Report at para 5.4; Motion Record, Tab 2, p 21 [[E975;E21](#)].

18. If no party appeals the determination of the Claims Officer within the necessary timeframe, the determination of the Claims Officer shall be final and binding upon the Receiver and the Lien Claimant and there shall be no further right of appeal, review or recourse to the Court.¹⁷

(ii) Claims Officers

19. The Receiver is proposing that both the Honourable Thomas J. McEwen and Mr. Joel Richler be appointed to act as Claims Officers pursuant to the proposed Lien Claims Resolution Order. As further detailed in the Fourth Report, former Justice McEwen and Mr. Richler are each highly reputable mediators and arbitrators, having significant experience in insolvency and construction matters.¹⁸

20. The proposed Lien Claims Resolution Order also provides that other persons may be appointed by the Court from time to time on motion by the Receiver to act as a Claims Officer.¹⁹

PART III – ISSUES, LAW & ANALYSIS

21. The sole issue to be considered on this motion is whether the Court should grant the proposed Lien Claims Resolution Order, among other things, approving a procedure for resolving Lien Claims asserted in Lien Notices delivered pursuant to the Lien Regularization Order and appointing the Honourable Thomas J. McEwen and Mr. Joel Richler to act as the Claims Officers.

22. For the reasons set out herein, the Receiver respectfully submits that it is just and convenient to grant the foregoing relief.

¹⁷ Fourth Report at para 5.4; Motion Record, Tab 2, p 21 [[E975;E21](#)].

¹⁸ Fourth Report at paras 5.6–5.8; Motion Record, Tab 2, p 22 [[E976;E22](#)].

¹⁹ Proposed Lien Claims Resolution Order at para 8; Motion Record, Tab 3, p 48 [[E1002;E48](#)].

A. The Lien Claims Resolution Order Should be Granted

(i) The Lien Claims Resolution Process Should be Approved

23. The Lien Regularization Order approved by the Court in March 2024 explicitly contemplates that the Receiver shall bring a motion seeking approval of a process for the resolution of Lien Notices at a time deemed by the Receiver to be appropriate.²⁰ The Receiver has determined that it is prudent at this juncture to seek approval of a claims resolution process and, accordingly, the approval of the Lien Claims Resolution Order is the appropriate next step in facilitating the efficient resolution of all Lien Notices delivered pursuant to the Lien Regularization Order.

24. The broad discretion contained in section 243(1)(c) of the *Bankruptcy and Insolvency Act* (“**BIA**”)²¹ provides the statutory basis for the Court to approve the claims resolution process contemplated by the proposed Lien Claims Resolution Order. As the Supreme Court of Canada has held, the “very expansive wording” of section 243(1)(c) has been interpreted as giving judges “the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise” in the context of a Court-ordered receivership.²² This broad jurisdiction permits the Court “to do not only what ‘justice dictates’ but also what ‘practicality demands.’”²³

²⁰ Fourth Report at para 2.3; Motion Record, Tab 2, pp 14–15 [[E968;E14](#) and [E969;E15](#)].

²¹ [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3](#), as amended [BIA], s. [243\(1\)\(c\)](#).

²² *Peace River Hydro Partners v Petrowest Corp*, [2022 SCC 41](#) at para [148](#), citing *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#) at para [20](#).

²³ *Third Eye Capital Corporation v Dianor Resources Inc*, [2019 ONCA 508](#) at para [57](#); *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc*, [1994 CanLII 7468, 114 D.L.R. \(4th\) 176](#) (Ont Ct J (GD)) at para [16](#).

25. Courts routinely grant claims procedure orders and approve adjudication mechanisms for the resolution of disputed claims in receivership and other Court-supervised restructuring proceedings.²⁴

26. In the circumstances of this case, the following factors support this Court's exercise of discretion to approve the proposed Lien Claims Resolution Order:

- (a) the process contemplated by the proposed Lien Claims Resolution Order is necessary to address the unresolved Lien Notices delivered to date and the possibility of further Lien Notices that could require resolution;
- (b) the process contemplated by the proposed Lien Claims Resolution Order has been designed to be a flexible, fair, and efficient means for resolving all outstanding and future Lien Notices;
- (c) the proposed Lien Claims Resolution Order will preserve judicial resources by providing for disputed Lien Claims to be determined by a Claims Officer in the first instance; and

²⁴ See, e.g., *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc et al* (16 October 2020), Ont Sup Ct J [Commercial List] CV-20-00637301-00CL ([Halo Claims Procedure Order](#)) at paras 15–17; *BCIMC Construction Fund Corporation et al v 33 Yorkville Residences Inc et al* (11 March 2021), Ont Sup Ct J [Commercial List] CV-20-00637297-00CL ([Priority Claims Procedure Order](#)) at paras 13–15; *Performance Sports Group Ltd et al* (1 September 2017), Ont Sup Ct J [Commercial List] CV-16-11582-00CL ([Claims Resolution Order](#)); *Pride Group Holdings Inc et al* (14 June 2024), Ont Sup Ct J [Commercial List] CV-24-00717340-00CL ([Entitlement Claims Process Order](#)) [*Pride Claims Process Order*] at paras 17–25.

(d) the Receiver believes that the proposed Lien Claims Resolution Order is appropriate in the circumstances, including because it will assist in advancing the receivership for the benefit of Project stakeholders.²⁵

(ii) *The Claims Officers Should be Appointed*

27. This Court's discretion under section 243(1)(c) of the BIA to approve the claims resolution process contemplated by the proposed Lien Claims Resolution Order also encompasses this Court's authority to appoint the Claims Officers.²⁶ The role of the Claims Officers as contemplated under the proposed Lien Claims Resolution Order is similar to the role of claims officers appointed in orders previously granted by this Court.²⁷

28. As further outlined in the Fourth Report, former Justice McEwen and Mr. Richler are each highly reputable mediators and arbitrators with a vast breadth of experience, notably in insolvency and construction matters.²⁸ The appointment of two Claims Officers will provide flexibility in terms of scheduling and in terms of selecting the Claims Officer whose expertise is best suited to resolve the particular Lien Notice at hand.²⁹

²⁵ Fourth Report at para 6.1; Motion Record, Tab 2, pp 22–23 [[E976;E22](#) and [E977;E23](#)].

²⁶ BIA, s. [243\(1\)\(c\)](#)

²⁷ See, e.g., [Pride Claims Process Order](#) at para 21; Target Canada Co, Re, (11 June 2015) Ont Sup Ct J [Commercial List] CV-15-10832-00CL ([Claims Procedure Order](#)) at para 43.

²⁸ Fourth Report at paras 5.6–5.8; Motion Record, Tab 2, p 22 [[E976;E22](#)].

²⁹ Fourth Report at para 5.8; Motion Record, Tab 2, p 22 [[E976;E22](#)].

PART IV – ORDER REQUESTED

29. For the foregoing reasons, the Receiver respectfully requests that the proposed Lien Claims Resolution Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of August, 2024.

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SCHEDULE “A”

LIST OF AUTHORITIES

- 1) *Peace River Hydro Partners v Petrowest Corp*, [2022 SCC 41](#)
- 2) *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#)
- 3) *Third Eye Capital Corporation v Dianor Resources Inc*, [2019 ONCA 508](#)
- 4) *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc*, [1994 CanLII 7468, 114 D.L.R. \(4th\) 176](#) (Ont Ct J (GD))
- 5) *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc et al* (16 October 2020), Ont Sup Ct J [Commercial List] CV-20-00637301-00CL ([Halo Claims Procedure Order](#))
- 6) *BCIMC Construction Fund Corporation et al v 33 Yorkville Residences Inc et al* (11 March 2021), Ont Sup Ct J [Commercial List] CV-20-00637297-00CL ([Priority Claims Procedure Order](#))
- 7) *Performance Sports Group Ltd et al* (1 September 2017), Ont Sup Ct J [Commercial List] CV-16-11582-00CL ([Claims Resolution Order](#))
- 8) *Pride Group Holdings Inc et al* (14 June 2024), Ont Sup Ct J [Commercial List] CV-24-00717340-00CL ([Entitlement Claims Process Order](#))
- 9) *Target Canada Co, Re*, (11 June 2015) Ont Sup Ct J [Commercial List] CV-15-10832-00CL ([Claims Procedure Order](#))

SCHEDULE “B”

STATUTORY REFERENCES

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

**KEB HANA BANK as trustee of IGIS GLOBAL MIZRAHI COMMERCIAL
PRIVATE PLACEMENT REAL ESTATE FUND NO. (THE ONE) LP, et al.
301 and as trustee of IGIS GLOBAL PRIVATE
PLACEMENT REAL ESTATE FUND NO. 434**

Court File No. CV-23-00707839-00CL

Applicant

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER
(Lien Claims Resolution Order)
Returnable August 9, 2024**

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